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In The Supreme Court of the United States

DORA B. SCHRIRO, Director,
Arizona Department of Corrections,

Petitioner,

v.

JEFFREY TIMOTHY LANDRIGAN a.k.a.
BILLY PATRICK WAYNE HILL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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CAPITAL CASE

QUESTION PRESENTED

Did the Ninth Circuit err by finding that the state court's analysis of Landrigan's ineffective assistance of counsel claim was objectively unreasonable under *Strickland* v. *Washington*, 466 U.S. 668 (1984), notwithstanding the absence of any contrary authority from this Court in cases in which the defendant impedes counsel's attempts to investigate and present mitigating evidence?

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INTEREST OF AMICI CURIAE

All decisions of this Court concerning the question of whether trial counsel's assistance meets constitutional standards are of interest to Amici States, as Amici States are responsible for defending presumptively valid state court judgments against post-conviction claims that trial counsel provided ineffective assistance. The decision below represents a substantial departure from this Court's test for assessing whether trial counsel has competently investigated mitigating evidence in a death penalty case. Under the standard applied in the decision below and by some other lower courts, the heavy measure of deference due to trial counsel's decisions has been replaced with a virtually irrebuttable presumption that any failure to discover any potentially mitigating evidence constitutes deficient performance. Amici States' interests will therefore be substantially affected by the resolution of this issue. This brief is submitted in support of petitioner by Amici States through their Attorneys General in accordance with Rule 37.4 of the Rules of the Supreme Court of the United States.

SUMMARY OF ARGUMENT

In *Strickland* v. *Washington*, this Court warned against intrusive post-trial inquiry into trial counsel's performance at the penalty phase of a capital case, and specifically cautioned against the promulgation of rigid checklists for assessing that performance. Notwithstanding this clear warning, intrusive post-trial inquiry and lengthy checklists have proliferated in the lower courts. Further, some lower court decisions, including the decision below, have set a standard for performance that requires

perfect investigations; those decisions have found to be constitutionally deficient any investigation by trial counsel that does not unearth everything discovered later by post-conviction counsel. Amici States urge this Court to reaffirm the principle that such hindsight review is improper and forms no legitimate basis for questioning the validity of capital sentencing proceedings.

Based upon a fundamental misreading of this Court's decisions in *Williams* v. *Taylor*, *Wiggins* v. *Smith*, and *Rompilla* v. *Beard*, the court below has created a standard under which any failure by a trial counsel to unearth any potentially mitigating evidence, even when such failure is based upon the statements and actions of the defendant that indicate such evidence need not be investigated and could be harmful to the case in mitigation, constitutes deficient performance.

Other courts, including the Third and Sixth Circuits, have erroneously promulgated specific and lengthy guidelines, based upon the idealized investigation recommended by the American Bar Association. Those courts have held that these guidelines define trial counsel's minimum duties and that failure to fulfill these guidelines in any particular renders trial counsel's performance per se deficient.

The Third, Sixth, and Ninth Circuits' exaggerated views of trial counsel's duties cannot be reconciled with this Court's plain statements in *Strickland* and other cases that trial counsel reasonably may limit the scope of potential investigation based upon the defendant's statements or actions, or based on the tactical determination that a particular course might be unproductive or that another course might be more fruitful.

Under the *Strickland* standard for determining whether trial counsel's performance complies with the Constitution, counsel's decision-making is entitled to respect and a heavy measure of deference. Proper application of the correct rule in the instant case requires careful consideration of a key (if not dispositive) fact that the decision below ignored: the defendant's active interference with the investigation and presentation of the case in mitigation.

ARGUMENT

THIS COURT SHOULD REJECT THE UNREALISTIC AND NON-DEFERENTIAL STANDARD ADOPTED BY THE NINTH CIRCUIT AND SOME OTHER LOWER COURTS FOR REVIEWING COUNSEL'S PERFORMANCE IN THE INVESTIGATION OF MITIGATION EVIDENCE

Respondent Landrigan actively interfered with his trial attorney's attempts to investigate and present mitigating evidence. Landrigan made scornful statements in open court about trial counsel's mitigation arguments that served only to support the case in aggravation. Further, Landrigan instructed his mother and his ex-wife not to cooperate in the investigation or presentation of the case in mitigation. Not only did this prevent trial counsel from eliciting their testimony, it also prevented trial counsel from gathering evidence he sought on the question of whether Landrigan suffered from mental deficits.

In holding that trial counsel provided unconstitutionally deficient representation, the decision below failed to

properly consider Landrigan's actions and statements, which were the most significant factors affecting trial counsel's decision-making. The decision below would annul *Strickland's* requirement that trial counsel's decisions be judged based upon the circumstances in which trial counsel found himself. Other lower courts have joined the Ninth Circuit in abandoning this mandated deference to trial counsel's decision-making, and have instead imposed a rule in which *any* failure to discover *any* even potentially mitigating evidence, even when that failure is prompted by the actions or statements of the defendant, is per se deficient performance. This new rule is irreconcilable with the deference required by this Court's clearly-established rule for assessing trial counsel's performance announced in *Strickland*; it is further irreconcilable with the doubly-deferential review of a state court decision rejecting a claim of ineffective assistance of counsel.

1. In *Strickland* v. *Washington*, 466 U.S. 668, 690 (1984), this Court presciently warned:

> The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges.

This proliferation has come to pass, due to a trend of decreasingly deferential post-trial inquiry into attorney performance, and the adoption by some lower courts of detailed guidelines for evaluating trial counsel's performance.

a. The decision below, and recent decisions of other courts, interpret three recent decisions of this Court, *Rompilla* v. *Beard*, 545 U.S. 374, 125 S. Ct. 2456 (2005), *Wiggins* v. *Smith*, 539 U.S. 510 (2003), and *Williams* v.

Taylor, 529 U.S. 362 (2000), as re-writing the standard for assessing whether trial counsel competently investigated and presented mitigating evidence in a death penalty case. According to these lower courts, *Rompilla*, *Wiggins* and *Williams* have articulated a standard in which trial counsel, to perform effectively, must investigate and discover all potentially mitigating evidence that might be presented before making any tactical decisions regarding what penalty-phase defense to present. *Landrigan* v. *Schriro*, 441 F.3d 638, 643 (9th Cir. 2006); see *Dickerson* v. *Bagley*, 453 F.3d 690, 693-95 (6th Cir. 2006); *Outten* v. *Kearney*, 464 F.3d 401, 417-18 (3d Cir. 2006).

Contrary to the views of these lower courts, *Rompilla*, *Wiggins* and *Williams* did not alter *Strickland's* well-settled standard. They simply applied *Strickland* in fact-specific assessments of trial counsels' performance. *Rompilla*, 545 U.S. at ___, 125 S. Ct. at 2469-70 (O'Connor, J., concurring) ("today's decision simply applies our long-standing case-by-case approach to determining whether an attorney's performance was unconstitutionally deficient under *Strickland*"); *Wiggins*, 539 U.S. at 522 (applying the "'clearly established' precedent of *Strickland*"); *Williams*, 529 U.S. at 390 (merits of claim "are squarely governed by our holding in *Strickland*").

b. Notwithstanding this Court's plain statements, the decision below reflects the view that this Court has somehow altered the standard for what constitutes the minimum performance required by the Constitution in the investigation of mitigation evidence in preparation for the penalty phase of a capital case. In the Ninth Circuit's view, this alteration permits the promulgation of an idealized standard of performance, in which anything short of a

perfect investigation falls below the constitutional minimum.

Thus, the decision below cites *Caro* v. *Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1999), for the proposition that "all relevant mitigating evidence be unearthed for consideration," *Landrigan*, 441 F.3d at 643. This statement is irreconcilable with this Court's clear directive in *Strickland*, 466 U.S. at 690-91, that, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Nor are these Ninth Circuit decisions compatible with this Court's holding in *Burger* v. *Kemp*, 483 U.S. 776, 794 (1987), that, even if trial counsel "could well have made a more thorough investigation than he did . . . counsel's decision not to mount an all-out investigation into petitioner's background in search of mitigating circumstances was supported by reasonable professional judgment."

The decision below also cites *Silva* v. *Woodford*, 279 F.3d 825, 840 (9th Cir. 2002), which held that a defense attorney's duty to investigate is "virtually absolute, regardless of a client's expressed wishes." See *Landrigan*, 441 F.3d at 647. This rule is irreconcilable with *Strickland's* clear directive that "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's statements or actions." 466 U.S. at 691. Thus, contrary to reason and common sense (as well as the plain statement in *Strickland*), the decision below has removed any consideration of the defendant's statements or actions from trial counsel's decision-making regarding potential avenues of investigation.

c. The Ninth Circuit is not alone in its unduly expansive view of the standards applicable to defense attorneys at the penalty phase of death penalty cases. Some lower courts have transformed the ABA Standards for Criminal Justice ("the ABA Standards") and the more-recently issued ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("the ABA Guidelines") into the very "checklist" *Strickland*, 466 U.S. at 688, warned against. See *Rompilla*, 125 S. Ct. at 2473 (Kennedy, J., dissenting) ("while we have referred to the ABA Standards for Criminal Justice as a useful point of reference, we have been careful to say these standards 'are only guides' and do not establish the constitutional baseline for effective assistance of counsel. . . . The majority, by parsing the guidelines as if they were binding statutory text, ignores this admonition.") This Court, however, made it clear that the references in *Rompilla, Wiggins*, *Williams* and *Strickland* to the "Defense Function" portion of the ABA Standards, and in *Rompilla* and *Wiggins* to the ABA Guidelines, were only for the purpose of obtaining *guidance* regarding the standards for assessing trial counsel's performance. *Rompilla*, 125 S. Ct. at 2466; *Wiggins*, 539 U.S. at 522-25; *Williams*, 529 U.S. at 396; *Strickland,* 466 U.S. at 688-89.

Despite this clear directive, the Court of Appeals in *Dickerson* v. *Bagley*, 453 F.3d at 693-95, for example, held that the ABA Guidelines are "the required standards of performance for counsel in capital cases regarding the investigation of mitigating circumstances" and concluded that "conducting a partial, but ultimately incomplete, mitigation investigation does not satisfy *Strickland's* requirements." Thus, in order to provide the minimum level of competence required by the Constitution, according to

Dickerson, "regardless of the expressed desires of a client," trial counsel *must* obtain and review:

- "Medical history, (including hospitalizations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage)," even if the defendant tells trial counsel that he has never been sick a day in his life;
- "Family and social history, (including physical, sexual or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment and peer influence)," even if the defendant tells trial counsel that he grew up in a healthy, loving home;
- "[T]raumatic events such as exposure to criminal violence, the loss of a loved one or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention (e.g., failure to intervene or provide necessary services, placement in poor quality foster care or juvenile detention facilities)," even if the defendant tells trial counsel that he has never experienced such things;
- "Educational history (including achievement, performance, behavior, and activities), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof, and activities," even if the defendant tells trial counsel that he was a straight-A student and captain of the football team;
- "Employment and training history (including skills and performance, and barriers to employability),"

> even if the defendant tells trial counsel that he had an excellent employment history.

Dickerson, 453 F.3d at 694.

And trial counsel's responsibilities do not end there. "It is necessary to locate and interview the client's family members . . . and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation or parole officers, and others." Also, "Records—from courts, government agencies, the military, employers, etc.—can contain a wealth of mitigating evidence, documenting or providing clues to childhood abuse, retardation, brain damage, and/or mental illness, and corroborating witnesses' recollections. Records should be requested concerning not only the client, but also his parents, grandparents, siblings, and children." *Dickerson*, 453 F.3d at 694-95. *Dickerson* holds that this exhaustive list comprises "the *required* standards of performance" and that any failure to complete any aspect of this list "does not satisfy *Strickland's* requirements." 453 F.3d at 693, 695 (emphasis added). See *Keith* v. *Mitchell*, 455 F.3d 662, 683-84 (6th Cir. 2006) (Clay, J., concurring in part and dissenting in part) (the ABA Guidelines impose an "obligation" on trial counsel); *Clark* v. *Mitchell*, 425 F.3d 270, 293-94 (6th Cir. 2005) (Merritt, J., dissenting) (the Supreme Court "embraced" the ABA Standards as "a relevant standard by which to judge the reasonableness of counsel's performance").

Like the Sixth Circuit in *Dickerson*, the Third Circuit in *Outten* v. *Kearney*, 464 F.3d at 417-18, held that the ABA Guidelines define trial counsel's duty. See *Marshall* v. *Cathel*, 428 F.3d 452 (3d Cir. 2005) (the ABA Standards define, in part, "prevailing professional norms").

Similarly, in *Summerlin* v. *Schriro*, 427 F.3d 623, 629-30 (9th Cir. 2005), the Ninth Circuit embraced the ABA Standards as defining trial counsel's "duty." This reliance on the 300-plus pages in the ABA Standards and the ABA Guidelines[1] as defining trial counsel's duties are precisely the "detailed guidelines" for the examination of trial counsel's performance that "interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions," and "distract counsel from the overriding mission of vigorous advocacy of the defendant's cause." *Strickland*, 466 U.S. at 689-90.

2. Not only is the lower courts' expansion of trial counsel's duties inconsistent with this Court's rulings, it is also bad policy. The deficiencies in performance identified in *Williams* (counsel's failure to seek available records regarding the defendant's troubled upbringing was based upon counsel's mistaken belief that state law barred access to such records), *Wiggins* (counsel did not investigate or present evidence in mitigation of which he was aware and about which he told the jury), and *Rompilla* (counsel possessed but inexcusably failed to review evidence he knew would be presented in aggravation) were identified in a straight-forward application of *Strickland*, without the need to alter that well-settled test. This Court should reject

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[1] The "Defense Function" portion of the ABA Standards (chapter 4) was first approved by that body in 1971, was revised in 1980, and was revised again in 1993; the third (and current) edition is 129 pages long. The ABA Guidelines were originally adopted in 1998, and were revised in 2003; they now consist of 178 pages of combined "black-letter" guidelines and commentary. American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (2003).

the lower courts' decisions altering the *Strickland* test, which has proven to be a sensitive and reliable instrument for the detection of deficiencies. These decisions would replace *Strickland* with a mechanical list that, as *Strickland* itself explains, runs the risk of ratifying deficient performance because it fulfills the checklist, or of condemning competent performance because it does not fulfill some artificial set of criteria.

Further, if the ABA-mandated "no stone unturned" approach that *Landrigan*, *Dickerson*, *Outten*, and the other cases have adopted is the *minimum* standard required by the Constitution, it is unclear what an *excellent* lawyer would do. If the Constitution requires that trial counsel interview "virtually" every person who ever knew the defendant or any member of the defendant's family, and review every scrap of paper ever associated with the defendant or his family, what more investigation could trial counsel who wished to exceed that minimum undertake?

Condoning this unrealistic standard will only exacerbate a troubling trend. Claims of ineffective assistance of counsel in the investigation and presentation of mitigation evidence have become the staple of state and federal habeas corpus litigation, principally because of the willingness of some federal courts to second-guess individual decisions of trial counsel. From 1992 to 1998, claims of ineffective assistance of counsel at the penalty phase were raised in 83 percent of federal habeas corpus cases involving state death penalty judgments. Price Waterhouse Coopers, COST OF PRIVATE PANEL REPRESENTATION IN FEDERAL CAPITAL HABEAS CORPUS CASES FROM 1992 TO 1998, p. VI-83. Further, such claims were viewed as the "most significant factor" contributing to the cost of federal habeas corpus

litigation. *Id.* The ubiquity of such claims is inconsistent with *Strickland's* "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. . . ." 466 U.S. at 689. Clearly, *Strickland's* warning that ineffective assistance of counsel claims would proliferate if hindsight imposition of checklist evaluations of trial counsel's decisions are permitted has gone unheeded.

3. Proper application in this case of the appropriately deferential *Strickland* standard requires careful consideration of a key fact to which the decision below turns a blind eye: Landrigan's interference with trial counsel's investigation and presentation of mitigating evidence.[2] Landrigan instructed his birth mother and ex-wife not to testify, thus preventing trial counsel from obtaining evidence that would have assisted the case in mitigation. And although trial counsel tried to argue that the aggravating factors were not as severe as the prosecution indicated, "'[e]ach of counsel's feints in the mitigation direction brought a statement from Landrigan that painted an even bleaker picture and made matters even worse.'" *Landrigan*, 441 F.3d at 652 (Bea, J., dissenting), quoting *Landrigan* v. *Schriro*, 272 F.3d 1221, 1226 (9th Cir. 2001). By failing to take into proper account the effect of Landrigan's actions and statements on trial counsel's decision-making, the decision below assessed

[2] The decision below states, "[t]here is no indication in the current record that Landrigan in any way prohibited or impeded [trial counsel's] ability to investigate or assemble a mitigation defense." *Landrigan*, 441 F.3d at 647. However, under *Strickland*, Landrigan's direction to his birth mother and ex-wife not to testify, which precluded trial counsel from investigating and developing evidence regarding Landrigan's social history and mental health, provided support for trial counsel's decision not to further investigate those areas.

trial counsel's performance under a standard that was incompatible with *Strickland*.

The Third, Sixth and Ninth Circuits would ignore direction from the defendant in evaluating trial counsel's decision-making regarding potential avenues for investigation. *Outten*, 464 F.3d at 417-18 ("Counsel's duty to investigate is not negated by the expressed desires of a client."); *Dickerson*, 453 F.3d at 693-95 ("The duty to investigate exists regardless of the expressed desires of a client."); *Landrigan*, 441 F.3d at 647 ("a lawyer's duty to investigate is virtually absolute, regardless of a client's expressed wishes"). The unrealistic standard reflected in these decisions, further, would require trial counsel to unearth all evidence that could potentially be presented in mitigation before making strategic choices regarding what evidence to present. This standard should be repudiated because it shows no deference—let alone the "heavy measure of deference" required by *Strickland*—to trial counsel's decision-making as regards investigation of the case in mitigation. In place of *Strickland*-mandated deference, this standard presumes to be unreasonable any decision by trial counsel to refrain from a particular course of investigation, even at the explicit direction of the defendant, if, years later and after the expenditure of enormous time and resources, it can be demonstrated that something of even marginal utility to the case in mitigation might have been discovered.

In *Yarborough* v. *Gentry*, 540 U.S. 1, 8 (2003) (per curiam), this Court explained that the "Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." In the same case, the Court held that judicial review of a defense attorney's performance is "highly deferential—and doubly deferential

when it is conducted through the lens of federal habeas." 540 U.S. at 6. In some circuits, this deference apparently no longer applies when a court is assessing trial counsel's decision regarding the investigation of mitigating evidence in a death penalty case.

Lower courts have misconstrued this Court's holdings in *Williams, Wiggins* and *Rompilla*—which, as this Court has previously stated, did not alter the *Strickland* test. This Court should restore *Strickland's* emphasis on deference to trial counsel's decision-making to its rightful place in the assessment of whether a defendant received the effective assistance of counsel in the investigation and presentation of mitigating evidence in death penalty cases guaranteed by the Constitution.

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be reversed.

Dated: November 13, 2006

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